v. Farhall [2] and *Ang Chee Seng v. Tan Kee Swee.* [3]

Mr. Arulanandom, for the applicant, relied on *Evans v. Bartlam* [4] as authority in support of the absolute discretion of the Court to make the order prayed for, and he relied on *Atwood v. Chichester* [5] as authority for the proposition that lapse of time is no bar to this application. I agree with him so far as the effect of *Atwood v. Chichester, supra* is concerned, but it appears to me that the Court's discretion must be exercised in accordance with the settled principle that if the judgment is a regular judgment then it is an almost inflexible rule that there must be an affidavit of merits stating facts showing a substantial ground of defence — *Hopton v. Robertson* [6] and *Farden v. Richter.* [7]

On the authority of *Farhall v. Farhall, supra, Labouchere v. Tupper, supra* and *Ang Chee Seng v. Tan Kee Swee, supra,* it is clear that the judgment was a regular judgment and there can be no merits in the application to set it aside.

In Civil Suit No. 239 of 1957, [8] the plaintiffs sued the defendant for the amount still owing to them after the sale of certain assets secured by a Bill of Sale; Barakbah, J. held that the matter was *res judicata* in the present suit by reason of Buhagiar, J's. judgment, and that that judgment was against the defendant personally. I respectfully agree and would refer to the case cited by Barakbah, J. in his judgment, *S. Supramaniam Pillay v. Tan Kah Kiat,* [9] from which it appears that there are no ground whatever for holding that Buhagiar, J's. judgment was irregular and no merits in the application to set it aside. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Braddell & Ramani.*

GOOI SEANG TUCK v. TAN PENG LOON & ANOR.

[O.C.J. (Rigby J.) February 3, 1959]

[Penang — Civil Suit No. 230 of 1958]

Practice and Procedure — Leave to defend — Appeal from Registrar's decision — Settlement of debt in smaller amount — Consideration — Accord and satisfaction — Cheque by 3rd party for a smaller sum — R.S.C. 1957, O.14 and O.54 r.21.

This was an appeal from a decision of the learned Registrar refusing leave to the appellant to defend proceedings brought against him under O.14 and giving the respondent leave to sign final judgment against him on the claim. At the commencement of the appeal counsel for the respondent raised, but did not seriously press, the preliminary point that the appellant was out of time with his appeal.

The normal practice in the Penang Supreme Court Registry is for the Registrar himself to fix a date for the return for hearing of the summons. In this instance the Registrar's decision was given on October 14, 1958 and the notice of appeal lodged on October 17. It was therefore lodged well within time. The learned Judge was informed by the Registrar during the hearing of this appeal, and in the presence of counsel for both sides, that at the time he received the notice of appeal he had already closed the list for the next ensuing date for work in Chambers, namely Monday, October 20. He therefore fixed the date for hearing in the list on the next date for the hearing of Chamber matters, namely, Friday, October 24 — the date on which the appeal was in fact heard. The learned Judge being satisfied, enlarged the time for hearing up to and including Friday, October 24, 1958.

The plaintiff claimed by way of a Specially Endorsed Writ for the sum of $12,000, being the balance due and owing to the plaintiff in respect of the sum of $50,000 paid by the plaintiff to the Bank of China as guarantor for the defendants under a contract of guarantee dated December 9, 1955. He applied under O.14 r.2 for leave to enter final judgment on the ground that there was no defence to the action. The 1st defendant, on behalf of both defendants, filed an affidavit showing cause. By his affidavit he admitted that the payment of the sum of $50,000 by the plaintiff to the Bank as guarantor for the defendants' firm had been made, but he averred that the claim had been settled "through arbitrators." The cheque in settlement was paid to the plaintiff by a third party.

Held: O.54 r.21 of the R.S.C. provides that in the case of an appeal from a Registrar to a Judge in Chambers not only must the appeal summons be taken out within five days from the Registrar's decision, but it must also be made returnable for hearing before the Judge within the five days. The advocate and solicitor should note that the primary responsibility rests with him to ensure that the notice of appeal in such matters should not only be taken out but also be made returnable within the period of five days. The most suitable course for counsel to ensure that the notice of appeal is returnable within the period of five days would be to request the Registrar to include it in the list (if need be, only for mention) for one or other of the days for the hearing of Chamber matters, namely, Mondays or Fridays;

(2) payment by a debtor of a smaller sum in satisfaction of a larger amount is not a good discharge of a debt, but where there is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration, such as a negotiable instrument given by a third party, as in the instant case, payment of a lesser sum in satisfaction of a debt may afford a complete accord and satisfaction.

Appeal allowed. Defendant given unconditional leave to defend this action.

Cases referred to:—

(1) *Bell v. North Staffordshire Rly. Co.* (1878-79) 4 Q.B.D. 205.
(2) *Gibbons v. London Financial Assn.* (1879-79) 4 C.P.D. 263.
(3) *Foakes v. Beer* (1884) 9 App. Cas. 605.
(4) *Pinnel's case* (1602) 5 Rep. 117a.
(5) *Sibree v. Tripp* 5 Rep. 117a.
(6) *Vanbergen v. St. Edmunds Properties Ltd.* (1933) 2 K.B. 223.
(7) *Cumber v. Wane* (1718) 1 Stra. 426.
(8) *Hughes v. Metropolitan Rly. Co.* (1877) 2 App. Cas. 439.
(9) *Birmingham & District Land Co. v. London & North Western Rly. Co.* (1888) 40 Ch.D. 268.
(10) *Central London Property Trust Ltd. v. High Trees House Ltd.* (1947) 1 K.B. 130.
(11) *Bidder v. Bridges* (1888) 37 Ch.D. 406.

APPEAL FROM REGISTRAR.

Ong Huck Lim (*Jag-Jit Singh* with him) for the appellants/defendants.

W. J. Chandler for the respondent/plaintiff.

Cur. Adv. Vult.

Rigby J.: This was an appeal from a decision of the learned Registrar refusing leave to the appellant to defend proceedings brought against him under O.14 of the Rules of the Supreme Court and giving the respondent leave to sign final judgment against him on the claim.

At the commencement of the appeal Mr. Chandler, for the respondent, raised, but did not seriously press, the preliminary point that the appellant was out of time with his appeal. O.54 r.21, which follows almost identically O.54 r.21 of the English Rules of the Supreme Court, provides that in the case of an appeal from a Registrar to a Judge in Chambers not only must the appeal summons be taken out within five days from the Registrar's decision, but it must also be made returnable for hearing before the Judge within the five days. (See the cases of *Bell v. The North Staffordshire Railway Co.* [1] and *Gibbons v. The London Financial Association* [2]).

The normal practice in the Penang Supreme Court Registry is for the Registrar himself to fix a date for the return for hearing of the summons. In this instance the Registrar's decision was given on the 14th October, 1958, and the notice of appeal lodged on the 17th October. It was, therefore, lodged well within time. I was informed by the Registrar during the hearing of this appeal, and in the presence of Counsel for both sides, that at the time he received the notice of appeal he had already closed the List for the next ensuing date for work in Chambers, namely, Monday, the 20th October. He, therefore, fixed the date for hearing in the List on the next date for the hearing of Chamber matters, namely, Friday, the 24th October — the date on which the appeal was, in fact, heard. I was, therefore, fully satisfied that I ought to enlarge the time for hearing up to and including Friday, the 24th October, 1958.

As a matter of practice, however, it is as well that advocates and solicitors should note that the primary responsibility rests with them to ensure that the notice of appeal in such matters should not only be taken out but also be made returnable within the period of five days. I think the most suitable course for Counsel to ensure that the notice of appeal is returnable within the period of five days would be to request the Registrar to include it in the List (if need be, only for mention) for one or other of the days for the hearing of Chamber matters, namely, Mondays or Fridays.

Turning now to the appeal itself. It does, to my mind, involve a point of law of considerable interest and practical importance as to the circumstances, if any, in which the payment by a debtor of a smaller sum in satisfaction of a larger amount may constitute a valid discharge of the whole debt and thereby afford a good defence to a claim for the balance of the full amount of the original debt due.

The plaintiff claims by way of Specially Endorsed Writ for the sum of $12,000, being the balance due and owing to the plaintiff in respect of the sum of $50,000 paid by the plaintiff to the Bank of China as guarantor for the defendants under a contract of guarantee dated the 9th December, 1955.

Under O.14 r.2 the plaintiff applied for leave to enter final judgment on the ground that there was no defence to the action. The 1st defendant, on behalf of both defendants, filed an affidavit showing cause. By his affidavit he admitted that the payment of the sum of $50,000 by the plaintiff to the Bank of China as guarantor for the defendants' firm had been made, but he averred that the claim had been settled "through arbitrators in the following circumstances." The affidavit continues:—

" (a) The plaintiff herein is the Chairman-Director of Messrs. Hock Bee Trading Co. Ltd., of No. 67, Beach Street, Penang, in which my father, Mr. Tan Shao Hwa

and my brother Mr. Tan Seow Loon previously held shares worth $42,000.

(b) My firm was not doing well and I and the co-defendant feared that if the plaintiff took action against my firm, then my firm would suffer seriously due to other creditors coming in. Therefore, to escape these serious consequences my firm tried to settle the debt of $24,000 to the plaintiff's firm.

(c) Accordingly to have the matter settled I offered my father's and my brother's shares in the plaintiff's firm to the plaintiff. The plaintiff valued the $42,000 worth of shares for only a sum of $10,000. Taking advantage of my firm's position the plaintiff threatened our firm with legal action. I agreed to sell my father's and my brother's shares at his offer of $10,000 and settled the debt of $24,000 with other considerations. This was done by arbitrators.

(d) At this time the plaintiff had guaranteed on behalf of my firm to the Bank of China, Penang, to a sum of $50,000. The plaintiff tried to withdraw the aforesaid guarantee given on behalf of my firm to the Bank of China, Penang. But the Bank refused to allow this and instead collected the amount from the plaintiff on the strength of his undertaking.

(e) The plaintiff therefore after having made arrangements for the debt of $24,000 started to insist upon payment of the $50,000 which he had already paid to the Bank of China.

(f) This time again the following arbitrators were called: — (1) Mr. Tan Mun Leng of Chop Nam Thong, (2) Mr. Tang Kee Yong of Chop Seong Lee.

(g) These two persons negotiated settlement of the debt with the piaintiff. They requested the plaintiff to consider the very low price he had given for the shares in his firm of my father and my brother (i.e. $10,000 for $42,000). They also told him of the serious financial position of my firm. The plaintiff himself knew very well that my firm was suffering financially. Therefore the plaintiff agreed to a suggestion of the arbitrators to settle the whole matter for the sum of $38,000.

"4. One of the arbitrators, Mr. Tan Mun Leng of Chop Nam Thong of No. 205, Beach Street, Penang, issued his own cheque for the sum of $38,000 in favour of the plaintiff who accepted the said cheque in full settlement of the said sum of $50,000."

The affidavit was supported by the further affidavit of Tan Mun Leng verifying the truth of the contents of the 1st defendant's affidavit and stating:—

"3. I am the person who issued the cheque for $38,000 and paid same to the plaintiff herein in full settlement of the sum of $50,000."

Assuming for a moment the facts alleged in the affidavits are true there were, in my view, two wholly independent transactions. In the first transaction the plaintiff was pressing for settlement of his claim for $24,000. The defendants, in order to avoid the possibility of legal action, reluctantly accepted, at the plaintiff's valuation, certain shares which their family had in the plaintiff's firm and settled this debt of $24,000 by "other considerations," which included a sale of these shares to the plaintiff at the plaintiff's own valuation of $10,000. That completed that transaction. Thereafter, the Bank of China had recourse to the plaintiff to implement his guarantee of $50,000 given on behalf of the defendants. The plaintiff was compelled to honour that guarantee and paid to the Bank the sum of $50,000. When he then sought to recover the $50,000 from the defendants emphasis was laid upon the serious financial position of the firm and it was further impressed upon him, through the medium of unofficial arbitrators, what a good bargain he had earlier obtained in getting shares said to be worth $42,000 at his own valuation of $10,000. As a result, the plaintiff agreed to accept a suggestion of the arbitrators to settle for $38,000 his claim for $50,000, and a cheque for that amount, $38,000, was paid to the plaintiff by one of the arbitrators in settlement of the full claim. Subsequently, the plaintiff thought better of his decision and instituted these proceedings to recover the balance of $12,000.

The House of Lords' decision in *Foakes v. Beer* [3] would seem to be clear authority for the proposition that payment by a debtor of a smaller sum in satisfaction of a larger amount is not a good discharge of a debt. Part of the argument advanced by Counsel for the debtor in that case is, to my mind, well worth quoting. It was argued — at page 606:—

"It may often be much more advantageous to the creditor to obtain immediate payment of part of his debt than to wait to enforce payment, or perhaps by pressing his debtor to force him into bankruptcy with the result of only a small dividend. Moreover if a composition is accepted friends, who would not otherwise do so, may be willing to come forward to assist the debtor. And if the creditor thinks that the acceptance of part is for his benefit who is to say it is not?"

Their Lordships, however, although sympathetic to that argument, were not prepared to follow it and adhered to the doctrine established by a long line of decided authorities commencing with *Pinnel's case* [4] in 1602, that, when an ascertained sum is already due under a contract, payment of a less sum is no consideration for a promise to forego the remainder. Lord Blackburn in the course of his speech said:—

".....in *Sibree v. Tripp*, [5] Parke, B. says, 'It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder.' And Alderson, B. in the same case says, 'It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid,

is payment only in part, because it is not one bargain, but two; viz. payment of part, and an agreement without consideration to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled'."

It is apparent that at least one of their Lordships came to that decision with considerable doubt and misgiving for, in the course of his speech, Lord Blackburn again said:—

"What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper."

That, however, was a decision of the House of Lords. It was accepted and applied without question by the Court of Appeal in 1933 in the case of *Vanbergen v. St. Edmunds Properties Ltd.* [6] It is unnecessary to consider the facts of that case, but in the course of his judgment therein Lord Hanworth, M.R. quoted the following passage from *Smith's Leading Cases*, 3rd edition:—

"'The general doctrine in *Cumber v. Wane* [7] and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows: viz., that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of a large amount, such an agreement being *nudum pactum*. But if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement'."

His Lordship then went on to say:—

"That is dealing with the case where there is to be a smaller sum in lieu of an ascertained sum by agreement, but where there is an agreement to pay the sum due the same principle applies. Lord Selborne, in *Foakes v. Beer*, [3] the latest case which investigated this principle of the law, deals with it in this way. In that case there was an agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments the creditor would not take any proceedings on the judgment. The question was whether that was a valid agreement or a *nudum pactum*, and it was held that it was merely a *nudum pactum*, being made without consideration. There Lord Selborne, in concluding his speech upon the point under consideration, said: 'What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber v. Wane*,[7] is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal'."

The main argument before the Registrar, put forward on behalf of the appellant, appears to have been that the value of the shares was the consideration for accepting the settlement of the $38,000. In his decision the learned Registrar held that there was no consideration given by the defendant at the time of the settlement, that is to say, that there was no legal consideration in law. He further held that the value of the shares, if it was a consideration at all, was past consideration and, therefore, no consideration.

Mr. Ong Huck Lim, who appeared before me on behalf of the appellant, adopted a somewhat different line of approach. First, he sought to rely upon the considerations of equity, which have their origin in the decisions of the House of Lords in *Hughes v. Metropolitan Railway Co.* [8], and *Birmingham & District Land Co. v. London & North Western Railway Co.* [9] and which were given effect to by Denning, J. (as he then was) in *Central London Property Trust, Ltd. v. High Trees House Ltd.* [10] in the principle that:—

".....where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the Court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value."

Secondly, Mr. Ong Huck Lim referred to, and relied upon, the case of *Bidder v. Bridges.* [11] This case was not cited before the learned Registrar nor, curiously enough, was it referred to at all in the case of *Vanbergen v. St. Edmunds Properties Ltd.*, [6] to which I have already referred.

The facts in *Bidder v. Bridges*, [11] to my mind, are of such importance in dealing with the case now under consideration before me that I propose to refer to them as briefly as possible. Certain proceedings taken by *A* against *B* were dismissed with costs. The costs having been

duly taxed, *B's* Solicitor took the Taxing Master's Certificate to *A's* Solicitor, who gave him a cheque for the amount of the costs and received the Certificate with a receipt endorsed. After the cheque had been paid *B's* Solicitor discovered that *B* was entitled to interest on the amount of the taxed costs, and applied to *A* to pay it. On *A* refusing so to pay *B* moved for an Order directing *A* to attend before the proper officer in order that a Writ of Execution might be issued for the interest. It was contended on behalf of *B* that the acceptance of the cheque and the omission to charge the interest upon the costs owing were not a bar to *B's* right to recover the interest afterwards and reliance was placed upon the House of Lords' decision in *Foakes v. Beer* [3] that payment of a judgment debt under express agreement will not prevent the judgment creditor from exercising his right to recover interest upon his debt. It was argued that the payment of a lesser sum cannot be a satisfaction of a greater debt. In dismissing the application Stirling, J. held that *B*, acting through his Solicitor, must be taken to have accepted the cheque of *A's* Solicitor in full satisfaction of the whole debt due from *A*. Stirling, J. distinguished the facts from the principle laid down in *Foakes v. Beer*, [3] in that in the instant case payment of the debt and its acceptance consisted in the receipt of a cheque, a negotiable instrument, given by a third party. *B* accepted not a negotiable instrument of his debtor *A*, but that of his Solicitor. His Lordship concluded his judgment by holding that the cheque of a third party given as this cheque was, was a satisfaction of the debt and was a good payment. That judgment was unanimously upheld by the Court of Appeal. It does, in fact, accord with the decision of the Court of Appeal in *Vanbergen v. St. Edmunds Properties Ltd.* [6] and the principle enunciated by Lord Hanworth, M.R. that where there is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration — such as a negotiable instrument given by a third party — payment of a lesser sum in satisfaction of a debt may afford a complete accord and satisfaction. The facts before me clearly come within that principle. Here there was a cheque given by a third party in settlement of the debt. On that ground alone I was, therefore, of the opinion that this appeal should be allowed, the decision of the learned Registrar set aside, and the defendant given unconditional leave to defend this action.

It, therefore, becomes unnecessary for me to consider the alternative ground of appeal raised by Mr. Ong Huck Lim that on the general principles of equity, to which I have referred, the respondent, by his conduct in accepting the cheque of a third party in full satisfaction of his claim, must be taken to have waived any strict legal rights he may have had for payment of the full amount of the debt, and is estopped by his conduct in subsequently suing for the full amount of his claim. I merely content myself with saying that on the facts before me this further ground of appeal raised by Mr. Ong Huck Lim is, in my view, well-founded and, if it had been necessary for me to do so, I would have allowed the appeal on this additional ground. It was for these reasons that I allowed this appeal with costs, set aside the Order of the learned Registrar, and granted unconditional leave to the appellant to defend this action.

Appeal allowed.

Solicitors: *Jag-Jit Singh; Presgrave & Matthews.*

LEO FERNANDO v. REG.

[A.Cr.J. (Rose C.J.) June 3, 1959]

[Singapore — Magistrate's Appeal No. 310 of 1958]

Criminal Law and Procedure — Assault — Injuries received in course of struggle between public servant and complainant in course of getting him under control — Conjecture as to circumstances — Discrepancies in accounts given by witnesses.

Police officer — Detention of obstreperous member of public — No justification for retaliatory assault.

In this case the appellant, a police officer, was convicted of voluntarily causing hurt to one Leong Peng Keen. The assault complained of was alleged to have taken place inside the Beach Road Police Station just prior to or in the course of the complainant's removal to the lock-up. Shortly before the alleged assault the complainant, a taxi-driver, had been involved in an altercation with two women passengers in his taxi; his behaviour apparently became so threatening as to lead to the intervention of the appellant. The complainant declined to proceed to the police station peaceably and assaulted the appellant. The complainant alleged that upon arrival at the charge room at the police station he was assaulted by two police officers, one of them being the appellant, in the course of which he received a kick from the appellant on the inner side of his left thigh. The case for the prosecution depended entirely upon the evidence of the complainant and the doctor who examined the complainant on the day following the incident. The